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In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

VICTORIA TCHOUKHROVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-71129
Agency Nos. A75-772-599, A75-772-600, A75-772-601

VICTORIA TCHOUKHROVA; DMITRI TCHOUKHROVA;
EVGUENI TCHOUKHROVA, PETITIONERS

v.

ALBERTO R. GONZALES*, ATTORNEY GENERAL,
RESPONDENT

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted
Sept. 1, 2004–Pasadena, California

Filed: Apr. 21, 2005

Before: STEPHEN REINHARDT, A. WALLACE TASHIMA, and KIM MCLANE WARDLAW, Circuit Judges.

Opinion by Judge REINHARDT.

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* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

OPINION

REINHARDT, Circuit Judge:

The question before us is whether under our immigration laws asylum may be granted to the parents of a disabled child who has been persecuted in his native land on account of his disability or whether, instead, we are compelled to force the family to return involuntarily to its home country where the child is likely to face further persistent and debilitating persecution. To answer that question, we must decide (1) whether disabled children and their parents who provide care for them may constitute a particular social group within the meaning of our immigration laws and (2) whether, in order to protect a disabled child from persecution, a parent of such child may apply for asylum and withholding of removal and may rely during the administrative proceeding on the past persecutory conduct directed against the child.

We hold that disabled children and their parents constitute a statutorily protected group and that a parent who provides care for a disabled child may seek asylum and withholding of removal on the basis of the persecution the child has suffered on account of his disability. We also hold that, given the record before us, the parent who is seeking asylum and withholding in this case is eligible for the former relief and entitled to the latter. Finally, we hold that the parent's spouse and the disabled child are eligible for asylum by virtue of their derivative applications and are also entitled to withholding of removal.

I. FACTUAL AND PROCEDURAL HISTORY

Evgueni Tchoukhrova was born in 1991 in Vladivostok, Russia with infantile cerebral paralysis, or cerebral palsy. His disability resulted chiefly from the negligence of members of the staff of the Russian state-owned hospital, who first induced his mother's labor and then abandoned her for the entire night, during which time the fetus did not receive sufficient oxygen. The next morning, because the induced labor had stopped, hospital personnel decided to forcibly extract the child from its mother's body, breaking its neck in the process. Instead of giving the newborn child medical care, they initially threw Evgueni into a container holding abortion and other medical waste, telling his mother that "they didn't see the reason why he needed to live." The mother, Victoria Tchoukhrova, having lost a lot of blood, fell into a state of unconsciousness.

Against all odds and despite the staff's neglect, Evgueni survived, and was retrieved from the disposal bin. As soon as she became conscious again, Victoria commenced pleading to see her son, without success. She was told that he was severely disabled and that she should "refuse" him. After five days, Victoria managed to convince a nurse to break the rules and let her visit her child in the middle of the night because she "wanted desperately to see him and to hold his lifeless body close to [her] heart."

Despite Victoria and her husband Dmitri's attachment to their newborn son, government officials tried to intimidate the couple into abandoning him to a state-run orphanage. Notwithstanding his parents' refusal to give their consent, Evgueni was transferred to an institution for orphaned children with birth defects.

Victoria and Dmitri repeatedly sought to visit their son but were denied permission for the first two months.

When the Tchoukhrovas finally gained entrance to the "hospital" for children with birth defects, the conditions were horrifying. The children were wrapped in old, wet, dirty linens and cried out from hunger. No one cleaned or otherwise took care of them. Some children writhed in pain but received no treatment. Despite their cries and obvious plight, the "children were simply abandoned." The Tchoukhrovas would not allow their child to remain in confinement under such deplorable conditions and, notwithstanding intense pressure from state authorities to consent to Evgueni's permanent institutionalization, Victoria and Dmitri secured his release and put him in a private clinic.

Evgueni's parents' struggles had still not ended. Once Evgueni was diagnosed as having infantile cerebral palsy, he was permanently labeled as disabled and was consequently banned from receiving any public medical support for his condition. In search of better medical care for their child, the family traveled three times to the Osteopathic Center for Children in San Diego. As a result of the treatment that he received in the United States, Evgueni was able to walk for the first time in his life. When the family returned to Russia, Victoria and Dmitri, in accordance with the recommendation of his American doctor, refused to allow Evgueni to be vaccinated. The doctor was concerned about the boy's fragile immune system. Because Evgueni was not vaccinated, it became difficult for him to obtain *any* medical care in state-run medical facilities.

The diagnosis of cerebral palsy resulted in Evgueni's being denied access to public school, despite the fact

that his disability was a physical and not a mental one.[1] The Russian government doctor recommended that, if Evgueni's parents insisted on refusing to allow him to be institutionalized, he "be isolated at home" and not taken out into public places, a recommendation that was understandable given the extreme degree of societal prejudice against the disabled in Russia. When Victoria took Evgueni out in public, he was subjected to verbal abuse and spat upon. Victoria would often hear parents say to their children: "Get away from that boy, can't you see that he's abnormal" or "Don't get near him, he's sick." Children would throw things at him. Although many of the interactions were simply frightening and humiliating, two assaults resulted in Evgueni's hospitalization. On one visit to a park when he was six years old, several young men attacked him. The broken arm and severe head trauma that he suffered due to this incident required him to be hospitalized for two months and led to insomnia, spontaneous crying, shaking, and paranoia. Victoria and Dmitri filed a report with the police, but they never investigated the incident. On another occasion, a women yelled at Victoria, "Get your ugly imbecile out of here," and shoved Evgueni to the ground. He was rushed to the emergency room and received several stitches in his head, from which he still has a visible scar. Victoria again filed a police report; this time, the police told her the case was insignificant and to settle it herself. Evgueni became so frightened of the dangers he faced every time he went outside that

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[1] In fact, Evgueni has been described by his current doctor as "an intelligent vital child who is determined to overcome his limitations." Since coming to the United States, Evgueni has learned English, has made friends, and is thriving at his elementary school where he is being educated in regular public school classes.

he refused to leave the house. All the while, the government continued to try to have him institutionalized.

Unable to get the government to treat their son with decency or even to attempt to protect him from the violent harassment he faced, Victoria and Dmitri decided to take political action in order to create a normal life for him. They joined together with other parents of disabled children and founded an association "that opposed the prevailing oppressive conditions of the handicap [sic] children," called "Mothers Unite!" Victoria worked to have a newspaper article published criticizing the Russian government's treatment of disabled children, but the proposed article was canceled at the last minute. The couple spoke to the authorities, wrote letters demanding equal rights, and engaged in fundraising on behalf of the cause. The family also sought help from the Moon Society; this action only provoked additional harassment. After one meeting, people threw stones at Victoria and vandalized the family's car. When Dmitri complained to the police, the authorities failed to respond. In 1997, Dmitri was fired from his job as a civil engineer and was unable to find employment for two years. In several job interviews, he was urged to stop advocating for the rights of the disabled. With hostilities toward the whole family increasing and the mounting certainty that Victoria and Dmitri would never be able adequately to protect their son and provide him with a life free from persecution, the family left for the United States in 2000.

Documentary evidence corroborates Victoria's testimony. The wretched treatment Evgueni received from both the Russian government and from private individuals in Russia is far from uncommon in that country. For example, the 2000 State Department Human

Rights Report ("State Department Report") confirms that Evgueni's treatment as a child with cerebral palsy reflects the standard practice. Russia institutionalizes its "orphans," more than 90% of whom are so-called "social orphans"—children who have at least one living parent but who, like Evgueni, are so-classified by the state because they have been deemed undesirable in some respect. The State Department Report states:

> [T]he prospects of children/orphans who are disabled physically or mentally are extremely bleak. The label of "imbecile" or idiot, which signifies "uneducable," is almost always irrevokable. The most likely future is a lifetime in state institutions.

The Report also explains that, once institutionalized, children are often "provided for poorly" and are in some cases "abused physically by staff." The State Department Report also incorporates the 1998 Human Rights Watch Report "Abandoned to the State," which chronicles the "shocking levels of cruelty and neglect" in the state institutions, called "*internaty*," where children with cerebral palsy and other disabilities are "warehoused":

> In addition to receiving little or no education in such internaty, these orphans may be restrained in cloth sacks, tethered by a limb to furniture, denied stimulation, and sometimes left to die half-naked in their own filth. Bedridden children aged five to seventeen are confined to understaffed lying-down rooms . . . and in some cases are neglected to the point of death.

According to the Human Rights Watch Report, "severely disabled babies are routinely abandoned at state-run maternity wards, under pressure from medi-

cal personnel who warn the recuperating mothers of a life as social pariahs if they keep a 'defective' child." All children who have been institutionalized face the danger of being diagnosed as "'*oligophrenic*,' or mentally retarded" even when they have no mental impairments. As explained in the report, those with "diagnoses of *oligophrenia* have extreme difficulty seeking a reassessment of their status," and "[t]hose who grow to adulthood are then interned in another 'total institution,' where they are permanently denied opportunities to know and enjoy their civil and political rights." Even the children who manage to be classified as "normal" while institutionalized face grim prospects because they "lack the necessary social, educational, and vocational skills to function in society."

Unfortunately, what is true for social orphans in Russia extends to disabled people generally in that country. As the State Department Report explains, the disabled face the danger of being "removed from mainstream society and isolated in state institution[s]"; they face "immense problems" created by the government and societal prejudice.

The Tchoukhrovas entered the United States on September 9, 2000 and shortly thereafter applied for asylum, withholding, and relief under the Convention Against Torture. Victoria filed the principal application for asylum and listed both Dmitri and Evgueni; she stated that she wished to include them in her application. In an oral decision, the immigration judge made explicit findings that (1) Victoria's testimony was credible, (2) the family were members of a particular social group, namely, "a family whose child is severely disabled," (3) the harms suffered by the Tchoukhrovas were on account of their membership in that particular

social group, (4) the government of Russia was responsible for the harms because "the government of Russia wishes to isolate handicapped children," (5) "Russian society does not tolerate people with disabilities," and (6) the family did suffer harm in Russia. However, while saying the case was close and that he hoped that the family would be able to stay in the United States, the immigration judge held that the harms the family suffered did not rise to the level of persecution. He therefore denied Victoria's application for asylum, withholding, and a prohibition against removal under the Convention Against Torture.[2] The BIA issued a summary, although not streamlined, decision in which it noted that the Tchoukhrovas had a "very sympathetic family history," but, nevertheless, adopted the immigration judge's decision and denied the relief sought. This petition for review followed.

II. STANDARD OF REVIEW

We accept the petitioner's testimony as true when, as here, the agency finds her to be credible. *Mihalev* v. *Ashcroft*, 388 F.3d 722, 724 (9th Cir. 2004). To establish eligibility for asylum, the petitioner must prove that she is unable or unwilling to return to her home country because of a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ." 8 U.S.C. § 1101(a)(42)(A); *see INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 (1987). An asylum applicant can establish eligibility either "because he or she has suffered

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[2] The Tchoukhrovas have since abandoned their Convention Against Torture claim. Furthermore, although the family requested voluntary departure at their hearing and although the immigration judge never ruled on that request, the Tchoukhrovas do not appeal that issue.

past persecution or because he or she has a well-founded fear of future persecution." 8 C.F.R. §1208.13(b) (2005). The applicant is entitled to withholding if she has suffered a past threat to life or freedom or is more likely than not to endure a future threat to life or freedom. 8 C.F.R. § 1206.16(b) (2005).

When the BIA adopts the immigration judge's decision as its own, we treat the immigration judge's reasons as the BIA's. *He* v. *Ashcroft*, 328 F.3d 593, 595-96 (9th Cir. 2003). Here, the BIA relied on *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994), which holds that "the Board's final decision may be rendered in a summary fashion," and that, in such cases "the Board's conclusions upon review of the record coincide with those which the immigration judge articulated in his or her decision." When the BIA does not express any disagreement with any part of the immigration judge's decision, but instead cites *Burbano*, the BIA adopts his decision in its entirety.

III. ANALYSIS

Because the immigration judge explicitly reached all of the component issues in the family's asylum and withholding claims, we review each of those determinations here, and, if relief is warranted, we are authorized to order that such remedy or remedies be granted.[3]

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[3] Contrary to the government's argument, *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam) does not require us to remand cases to the BIA when an immigration judge has decided an issue of first impression and the BIA issues a *Burbano* affirmance adopting the IJ's opinion in a summary fashion, as the BIA has, by virtue of the *Burbano* affirmance, already ruled on the issue in question. We note that a *Burbano* affirmance is different from a streamlined affirmance which signifies only "that the result reached in the decision under review was correct; that any errors in the deci-

We agree with the legal conclusion of the immigration judge and the BIA that disabled children and their parents who provide care for them are members of "a particular social group." We also agree that the factual findings that Evgueni and his parents were members of that social group, were harmed (directly or indirectly) on account of their membership, and that these harms were inflicted by the Russian government or those whom it was unwilling or unable to control are supported by substantial evidence. Furthermore, although we agree that, as a matter of law, the immigration judge was correct to look at the harms faced by the Tchoukhrovas collectively when evaluating Victoria's application, we hold that his determination that the harms did not rise to the level of persecution is not supported by substantial evidence.

A. On Account Of A Particular Social Group

The first question we must consider is whether disabled children and their parents who provide care for them constitute a particular social group within the meaning of 8 U.S.C. § 1101(a)(42)(A). Whether a category constitutes "a particular social group" for the purposes of asylum and withholding of removal is a legal question we review de novo. *Hernandez-Montiel* v. *INS*, 225 F.3d 1084, 1091 (9th Cir. 2000). A "particular social group" is one in which the members are "united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be re-

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sion under review were harmless or nonmaterial." 8 C.F.R. § 1003.1(a)(7)(ii); *Chen* v. *Ashcroft*, 378 F.3d 1081, 1087 n.2 (9th Cir. 2004).

quired to change it." *Id.* at 1093. We agree with the agency that Russian disabled children and their parents constitute a "particular social group."

We begin by noting that persons with disabilities are precisely the kind of individuals that our asylum law contemplates by the words "members of a particular social group." While not all disabilities are "innate" or "inherent," in the sense that they may be acquired, they are usually, unfortunately, "immutable." *Id.* at 1087, 1093; *see also* Americans with Disabilities Act of 1990, Pub. L. No. 101 336 § 2(a)(7) *codified* at 42 U.S.C. § 12101(a)(7) ("[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness . . . based on characteristics that are beyond the control of such individuals . . . ."). Because disability constitutes precisely the sort of "immutable characteristic" that an individual "cannot change," as contemplated by our law, we have no trouble concluding that persons with disabilities can constitute a "particular social group" for purposes of asylum and withholding of removal law.

As the above analysis suggests, we include within the social group only persons whose disabilities are serious and long-lasting or permanent in nature. We need not decide whether such persons necessarily constitute a social group in every country, although it is clear from our references to the Americans with Disabilities Act that in this land they do. For purposes of this case, we need determine only two narrow questions. First, do disabled children in Russia constitute a particular social group? And, second, may their parents be joined with

them in that classification? We answer both questions affirmatively.

Disabled children in Russia constitute a distinct and identifiable group. In this respect, disabled Russian children resemble the particular social groups our circuit has previously recognized. *See, e.g., Mohamed* v. *Gonzales*, 400 F.3d 785, 796-98 (9th Cir. 2005) (holding that a Somali woman under threat of female genital mutilation was a member of a particular social group); *Karouni* v. *Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005)(holding that "*all* alien homosexuals are members of a 'particular social group'"). Disabled children in Russia share not only common characteristics but a common experience as well. Their mistreatment by the state and society in general is well-documented before us, by explicit discussion in both the State Department Report and a Human Rights Watch Report devoted to the issue. Russian children who are disabled experience permanent and stigmatizing labeling, lifetime institutional *internaty*, denial of education and medical care, and constant, serious, and often violent harassment. All of this evidence supports our conclusion that in Russia disabled children constitute a particular social group.

We further hold that Russian parents who provide care for their disabled children are properly included in the particular social group. Parents who resist the harms inflicted by the Russian government upon their children often express a political opinion while doing so, and thus may be entitled to asylum on that basis as

well."[4] But, in providing care for their disabled children, parents are doing something more fundamental than engaging in politics: They are acting out of love and devotion for their children. Helping care for one's disabled child is an act basic to one's humanity. Parents who provide such care act in a manner that is "so fundamental" to their identities that they "should not be required to change." *Hernandez-Montiel*, 225 F.3d at 1093; *see also Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). Likewise, just as their children's disabilities are "immutable," so is a parent's relationship to a disabled child. Because the parents and their disabled child incur the harm as a unit, it is appropriate to combine family members into a single social group for purposes of asylum and withholding. Furthermore, including parents in the social group with their disabled children is consistent with the definition of a "particular social group" that we sometimes employ, namely, "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." *Sanchez-Trujillo* v. *INS*, 801 F.2d 1511, 1576 (9th Cir. 1986). The family interest in preserving the rights and protecting the welfare of a disabled child welds the parents (or those in loco parentis) together with the disabled child in a manner that qualifies all of them as members of a social group for purposes of our immigration laws.

We therefore come to the same legal conclusion as the agency and hold that Russian disabled children and

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[4] Indeed, Victoria and Dmitri pursued political means to redress their son's mistreatment—forming a political group, raising funds, meeting with political leaders, and writing letters.

their parents who help care for them constitute a social group for purposes of our immigration statutes. See 8 U.S.C. §1101(a)(42)(A). If individuals experience persecution on account of their membership in that group, they may seek asylum and withholding of removal.

In addition to the legal questions, we also consider the immigration judge's factual determinations that (1) the Tchoukhrovas were members of this particular social group, (2) the harms that they experienced were on account of their membership in the social group, and (3) the harms that occurred were inflicted by the government or those whom the government was unwilling or unable to control. In this case, none of these factual determinations is disputed. Uncontroverted evidence supports the findings that Evgueni suffers from cerebral palsy and is classified as disabled by the Russian government, that Victoria and Dmitri have dedicated their lives to caring for their son, and that the Tchoukhrova family was therefore part of the "social group" of disabled Russian children and their parents. Furthermore, it is undisputed that the government's cruel mistreatment of Evgueni and the violence to which he was subjected by private parties were both on account of his membership in that group and that the government not only inflicted harm directly but was unwilling or unable to control the persecutory conduct of the private parties involved. Accordingly, the requirements for finding "persecution" under the statute are all met, except for the question whether the harmful and injurious conduct to which Evgueni was subjected rose to the level of persecution.

B. Rising To The Level Of Persecution

1. Preliminary Question

Before addressing the final issue, we must decide a threshold procedural question: May the harms suffered by a disabled child be taken into account when determining whether to grant his parent's asylum application? Once again, we agree with the approach taken by the agency in this case. Without discussing the question expressly, the agency treated the harms inflicted on the family members cumulatively. Both the purposes of our immigration statutes and the background principles of law generally applicable to families and children mandate the procedure followed by the agency in this case.

Immigration law has always had a purpose of protecting families and, where possible, keeping them united. *See, e.g., Solis-Espinoza* v. *Gonzales*, ___ F.3d ___ (9th Cir. 2005) ("The Immigration and Nationality Act ("INA") was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members."). It has also always been a principle of American law that the family is a unique and important social unit entitled to legal protection. *See Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) (emphasizing the "important" and "essential" nature of the family and holding that "integrity of the family unit" is constitutionally protected); *see also Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (rejecting any notion that a "child is the mere creature of the State") (inter-

nal citations omitted). Caring for the family is also consistent with our international obligations. *See, e.g.*, International Covenant on Civil and Political Rights, art. 23, opened for signature, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, 375 (ratified by the United States on September 5, 1992) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."). Imputing the disabled child's harms to the parent filing an application for asylum on behalf of the family members vindicates these basic principles and statutory purposes, and renders the law consonant with both common sense and the important family values on which this nation prides itself. The agency was correct, as a matter of law, to do so here.

The procedural issue arises as a consequence of the limited scope of derivative asylum applications. Under 8 U.S.C. § 1158(b)(3), only a spouse or child of an alien may obtain asylum eligibility derivatively when the petitioning alien's application is approved. Although the statute provides that minor children may obtain asylum derivatively through their parents, there is no comparable provision permitting parents to obtain that relief derivatively through their minor children. Accordingly, if a minor child is granted asylum as a derivative applicant of his parent's principal application, both parents and child can stay in the United States. However, if the child is the principal applicant and is granted asylum, the child can legally stay in this country, but his parents will be removed. This second circumstance occurs rarely because parents fleeing to this country usually have their own claims of persecution, and it is infrequent that the child is the only member of the family who has been directly persecuted in the

family's native country. *See generally* Jeff Weiss, U.S. Dep't. of Justice, Guidelines for Children's Asylum Claims, *at* 1998 WL 34032561 (1998) ("The majority of children who apply for asylum do so riding along with a parent's ('principal') application."). However, when it is only the child who is the direct victim, a narrow interpretation of our asylum laws could have devastating practical effects: Facing imminent removal, parents could be forced to make a choice between abandoning their child in the United States or taking him to a country where it is likely that he will be persecuted.

In the case of disabled children, this dilemma is exacerbated. Although all children are dependent and vulnerable, disabled children are particularly so. Children with disabilities have unique needs, their treatment frequently requires specialized knowledge, and their care often involves heightened levels of compassion and patience that parents are particularly suited, and motivated, to give. *See Parham* v. *J. R.*, 442 U.S. 584, 618 (1979) ("For a ward of the state, there may well be no adult who knows him thoroughly and who cares for him deeply[,] [u]nlike with natural parents where there is a presumed natural affection to guide their action. . . ."). Furthermore, because children with disabilities still face considerable discrimination, even in a country such as our own, they require more protection than children who are not confronted with such prejudices. Therefore, if we were to interpret the law as requiring persecuted disabled children to apply for asylum on their own as principal applicants, while barring their parents from applying for asylum on their behalf or on the basis of the persecution that the children have experienced or fear, the consequences would be particularly disastrous. Disabled children would be

able to live either in a country free from persecution or with a care-giving parent, but not both. This interpretation would result in affording relief to persecuted disabled children in name only. Fortunately, our law is not so cruel as to require that result.

Our precedent supports the pragmatic approach applied here by the agency. When confronting cases involving persecution of multiple family members, we have not formalistically divided the claims between "principal" and "derivative" applicants but instead, without discussion, have simply viewed the family as a whole. *See, e.g.*, *Kaiser* v. *Ashcroft*, 390 F.3d 653, 660 (9th Cir. 2004) ("Because Kaiser and his family have a well-founded fear of persecution in Pakistan . . . we grant the petition with respect to Petitioners' asylum claim and remand to the BIA."); *Maini* v. *INS*, 212 F.3d 1167, 1177 (9th Cir. 2000) ("Accordingly, we hold that the Maims are 'statutorily eligible for asylum.'"); *Singh* v. *INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) ("[W]e conclude that Singh and his family are eligible for asylum based on the past persecution they suffered in Fiji."); *Prasad* v. *INS*, 47 F.3d 336, 339 (9th Cir. 1995) (discussing the "family's application"). Following that practice here, we hold that a parent of a disabled child may file as a principal applicant in order to prevent the child's forced return to the family's home country and may establish her asylum claim on the basis of the persecution inflicted on or feared by the child.

2. Extent Of Past Harm

Although we have agreed with the agency's adjudication of this case thus far, we conclude that it erred in finding that the injurious conduct to which Evgueni and his parents were subjected did not rise to the level of persecution. Substantial evidence does not support

that finding. To the contrary, the record compels the conclusion that the harm suffered by the Tchoukhrovas constituted persecution within the meaning of 8 U.S.C. § 1101(a)(42).

Throughout Evgueni's life, he has suffered greatly at the hands of others. Below, we explain the four kinds of injurious conduct to which he has been subjected. Although most of these harms could rise to the level of persecution independently, there is no doubt that, when taken together, they constitute persecution. *Guo* v. *Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (explaining how the court "look[s] at the totality of the circumstances in deciding whether a finding of persecution is compelled").

The first form of injury inflicted on Evgueni occurred in the hospital at the time of his birth. Although the breaking of his neck was likely a result of gross negligence, the subsequent attempted disposal of the newborn child as medical waste because he was "damaged" was unquestionably intentional. The immigration judge failed to discuss this incident when deciding that the treatment to which Evgueni was subjected did not constitute persecution. Although there are no precedents on point—most likely because few living individuals have been discarded along with aborted fetuses and survived—we have no doubt that being treated as waste and thrown into a pile of human remains, when done on account of a protected ground, rises to the level of persecution.

The second form of injury Evgueni suffered was his involuntary confinement in an "*internaty*." Aside from any pain or suffering associated with the conditions of the confinement, children, like adults, have a right to be free. The deprivation of freedom can constitute perse-

cution and can form the basis of eligibility for asylum or entitlement to withholding. *See, e.g.*, 8 C.F.R. § 1208.13; 8 C.F.R. § 1208.16 (an alien may be entitled to withholding of removal when his "life or freedom" would be threatened on account of a protected ground). It is true that "we have held that some circumstances that cause petitioners physical discomfort or loss of liberty do not qualify as persecution." *Mihalev*, 388 F.3d at 729. Here, however, Evgueni was confined against his parents' will for two months as a child. He was not a danger to society. Nor was it necessary that the state provide care for him. (Indeed, the state gave him virtually no care during his institutionalization.) Evgueni deserved to be free. *See Parham*, 442 U.S. at 600 (holding that disabled children have "a substantial liberty interest in not being confined unnecessarily").

The fact of Evgueni's unnecessary, involuntary, and unjustified confinement might alone be sufficient to warrant a finding of persecution. Given the horrifying conditions of his confinement, however, any reasonable factfinder would be compelled to conclude that in his case the confinement rose to that level. At Evgueni's "*internaty*," the children were wrapped in wet, soiled linens and abandoned in cold rooms to spend their days alone without human contact, much less affection. No one cleaned them and they were rarely and inadequately fed. They did not receive medical treatment, even those who were in great pain from the injuries they suffered. Their frequent screams elicited no response from the institution's staff. Evgueni spent his first two months of life in these shameful conditions and is lucky to have survived.

Under our precedent, involuntary detentions under harsh conditions can constitute persecution. See *Ndom*

v. *Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (holding that two detentions, for a total of 25 days, in "dark, crowded cells without formal charges," "shackled in cuffs that prevented him from straightening his legs," and "forced to urinate in his clothes" along with threats constituted persecution); *Kalubi* v. *Ashcroft*, 364 F.3d 1134, 1136 (9th Cir. 2004) (noting that immigration judge found that imprisonment in a "over-crowded jail cell with harsh, unsanitary and lifethreatening conditions" established persecution). That Evgueni was subjected to such harsh conditions at a tender age strengthens his claim. The time he spent suffering, without any stimulus or love, were two developmentally crucial months of his life. See *Parham*, 442 U.S at 627-28 (Brennan, J. concurring in part and dissenting in part) (explaining how institutional confinement has more severe consequences on children than adults and that "childhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives"). Furthermore, the fact that Evgueni's treatment was standard practice for the Russian government and not directed at him personally does not lessen the nature of the harm he experienced. In fact, "the more serious and widespread the threat of persecution to the group," the easier it is for an applicant to prove a well-founded fear of persecution. *Mgoian* v. *INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999). Finally, while we do not assume that the Russian government had Evgueni's best interests at heart when it institutionalized him—indeed, the evidence supports the opposite conclusion—the lack of malicious intent on the part of the persecutor is irrelevant to this aspect of our inquiry. *See, e.g.*, *Pitcherskaia* v. *INS*, 118 F.3d 641, 648 (9th Cir. 1997) ("The fact that a persecutor believes the

harm he is inflicting is 'good for' his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution . . . . Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as 'curing' or 'treating' the victims."); *In re Kasinga*, 21 1. & N. Dec. 357, 365 (BIA 1996) (holding that "'punitive' or 'malignant' intent is not required for harm to constitute persecution"). Thus, Evgueni's confinement under the conditions that existed in his *internaty* constituted significant persecutory conduct.

The third form of harm Evgueni suffered was continuing discrimination by the Russian government following his release from confinement. Because he was officially labeled as disabled by the Russian government, Evgueni was denied rights afforded to all other citizens. One right that was significantly circumscribed was access to medical care. Specifically, Evgueni was never given any treatment for his cerebral pa[illegible] and had difficulty obtaining routine medical care afforded to other Russians as a matter of course. He was also denied the benefits of another right—the right to an elementary education. While Evgueni is an intelligent and thriving young boy, the disability label the government attached to him served to bar him from attending public schools. The immigration judge excused the Russian government's treatment of Evgueni because Russia "does not have the resources to provide medical attention to individuals at the same standards as in developed nations." He applied the same reasoning to the state's refusal to provide Evgueni with an elementary or other education. However, that reasoning was erroneous.

It is true generally that a country's failure to provide its citizens with a particular level of medical care or education due to economic constraints is not persecution. *See Raffington* v. *INS*, 340 F.3d 720, 723 (8th Cir. 2003). However, claims of financial difficulties cannot be used to justify the deprivation of services essential to human survival and development, if the deprivation is based on the recipient's membership in a statutorily protected group. The government's refusal to provide medical care and an elementary education to "disabled children" solely because they are members of the particular social group the term describes cannot be excused on the basis of the need to limit expenditures. If medical or education resources are to be limited, the allocation of funds must be based on other, less invidious, grounds. Although denying medical care or education on the basis of race, ethnicity, religion, political opinion, or membership in a particular social group is, at a minimum, discrimination, where the denial seriously jeopardizes the health or welfare of the affected individuals, a finding of persecution is warranted.

Furthermore, Evgueni remains under constant threat that he will be returned to an *internaty* by the Russian government, as Russia confines both disabled children and adults in "total institutions." In these institutions, the inmates are denied all their civil and political rights and kept in inhumane circumstances. While Evgueni's parents have been successful so far in preventing the government from re-institutionalizing him, if the government were to prevail in its efforts, Evgueni would be subjected to a lifetime of suffering. The continuing threat of that confinement, when considered along with the continuing denial of a public education and of medical care for the condition that

plagues Evgueni, provides strong support for the claim of persecution.

The fourth form of harm from which Evgueni suffered is violence on the part of individual citizens. When considering whether the adverse treatment to which Evgueni was subjected rose to the level of persecution, the immigration judge failed even to mention this factor, and completely ignored the two assaults on Evgueni that caused him serious bodily injury. In doing so, the immigration judge committed error. The two incidents were serious indeed; in both instances Evgueni required medical attention and as a result of one of them he was hospitalized for a two month period. *See, e.g., Chand* v. *INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000) ("Physical harm has consistently been treated as persecution."); *Durate de Guinac* v. *INS*, 179 F.3d 1156, 1161 (9th Cir. 1999) ("[W]e have consistently found persecution where, as here, the petitioner was physically harmed. . . ."). The Tchoukhrovas reported these and other incidents to the authorities, who refused even to investigate them. As the Russian government was "unwilling or unable" to control the conduct of those who assault the disabled, the Tchoukhrovas are entitled to seek asylum and wihthholding of removal on that basis. *Malty* v. *Ashcroft*, 381 F.3d 942, 948 (9th Cir. 2004); *see also Avetova-Elisseva* v. *INS*, 213 F.3d 1192, 1198 (9th Cir. 2000) (holding that the fact that "financial considerations may account for" Russia's inability to prevent persecution "does not matter").

Taken as a whole, the harm to which Evgueni was subjected unquestionably rose to the level of persecution. Because this persecution is properly considered when adjudicating his mother's claim, we hold that Victoria has suffered past persecution, and note that

the same would be true whichever parent was the principal applicant.

3. Well-Founded Fear

Because Victoria suffered past persecution, she is entitled to a presumption. 8 C.F.R. § 1208.13(b)(1). Here the immigration judge did not apply the presumption and therefore did not consider whether the INS met its rebuttal burden. In such cases, we often remand for the agency to resolve, in the first instance, the question of a "fundamental change in circumstances" or that there is the possibility of relocation—the two ways the INS could demonstrate that the Tchoukhrovas no longer have a well-founded fear—in the first instance. *See Ventura*, 537 U.S. at 14, 17-18; *Lopez* v. *Ashcroft*, 366 F.3d 799, 806-07 (9th Cir. 2004). However, when the INS makes no argument before the immigration judge or the BIA concerning changed conditions, we do not remand. *See Ndom*, 384 F.3d at 756; *Baballah* v. *Ashcroft*, 367 F.3d 1067, 1078 n.11 (9th Cir. 2004). Here, the INS made no argument to the agency—or to us—that there has been a fundamental change in circumstances or a possibility of relocation. Moreover, no evidence regarding improvement in the conditions facing the disabled in Russia appears in the record. To the contrary, the record clearly shows that Russia continues to treat its disabled population, and particularly its disabled children, cruelly and inhumanely. Under these circumstances, the presumption has not been, and cannot be, rebutted. Thus, Victoria has established a well founded fear of persecution. Accordingly, she is statutorily eligible for asylum, and we remand for the Attorney General to exercise his discretion. If Victoria is granted asylum, Dmitri and Evgueni may obtain relief through their derivative applications.

Because it is more likely than not that Evgueni would face persecution if he were returned to Russia, Victoria is also entitled to withholding of removal, 8 C.F.R. §1208.16(b)(1), as are Dmitri and Evgueni. The agency erred in failing to grant this relief. *See, e.g., Qu* v. *Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005); *Agbuya* v. *INS*, 241 F.3d 1224, 1231 (9th Cir. 2001) (as amended). Accordingly, we also remand for the grant of withholding of removal.

GRANTED and **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

Files: A75-772-599-San Diego
A75-772-600, A75-772-601

IN RE: VICTORIA TCHOUKHROVA; DMITRI TCHOUKHROV; EVGUENI TCHOUKHROV

[Filed: Feb. 25, 2003]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Tatyana A. Edwards, Esquire

ON BEHALF OF SERVICE:
Michael K. Adams
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)]—In the United States in violation of law (all respondents)

APPLICATION: Asylum; withholding of removal; relief pursuant to the Convention Against Torture

ORDER:

PER CURIAM: In a decision dated August 8, 2001, the Immigration Judge found the respondents removable as charged, denied the adult female (lead) respondent's request for asylum, withholding of removal, and relief pursuant to the Convention Against Torture[1], and ordered the respondent's removed from the United States to Russia. The respondents appealed this decision. The appeal is dismissed. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). While the respondents present a very sympathetic family history, we are not persuaded that the Immigration Judge's decision was in error in finding that the lead respondent has not adequately demonstrated that she was a victim of past persecution on account of political opinion or membership in a particular social group or that she has a well-founded fear or faces a clear probability of such persecution in her country of nationality. Accordingly, we affirm the decision of the Immigration Judge.

/s/ [ILLEGIBLE]
NEIL P. MILLER
FOR THE BOARD

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[1] *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A.res. 39/46 (annex, 39 U.N. GAOR Supp. (No. 51) at 197), U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988). The respondents did not contest on appeal the Immigration Judge's ruling regarding protection under the Convention Against Torture.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

Files: A75-772-599-San Diego
A75-772-600, A75-772-601

IN RE: VICTORIA TCHOUKHROVA; DMITRI TCHOUKHROV; EVGUENI TCHOUKHROV, RESPONDENTS

[Filed: Aug. 8, 2001]

IN REMOVAL PROCEEDINGS

CHARGE:

Section 237(a)(1)(B) of the Immigration and Nationality Act, a non-immigrant who remained in the United States longer than authorized

APPLICATIONS:

Section 208 of the Act, asylum; Section 241(b)(3) of the Act, withholding of removal; relief under the Convention Against Torture

ON BEHALF OF RESPONDENT:

Tatyana Ewards, Esquire
7748 Herschel Avenue
La Jolla, CA 92037

BEHALF OF SERVICE:

Michael K. Adams, Esquire
Assistant District Counsel
Immigration and Nationalization Service
San Diego District

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent, Victoria Tchoukhrova, is a 30-year-old female, native and citizen of Russia who is charged with being removable as noted above. Respondent, Dimitri Tchoukhrova is a 30-year-old male, native and citizen of Russia who is charged with being removable as noted above. Respondnet, Evgueni Tchoukhrova, is a 14-year-old native and citizen of Russia who is charged with being removable as noted above.

The Service alleges that all three respondents were admitted to the United States on September 9th, 2000, as non-immigrant visitors with authorization to remain in the United States until March 8th, 2001. The Service further alleges that all three respondents remained in the United States beyond March 8th, 2001, without authorization from the Immigration and Naturalization Service.

Respondents admitted the truthfulness of the factual allegations contained in their individual Notice[s] to Appear and conceded that they are removable under the charge stated therein. Based upon these admissions, I find that all three respondents are removable as charged.

The respondents declined to designate a country for removal purposes, and this Court designated Russia should such action become necessary. As relief from removal, the respondent, Victoria Tchoukhrova, has applied for asylum pursuant to Section 208 of the Act, which is also considered an application for withholding of removal pursuant to Section 241(b)(3) of the Act. The respondent has also applied for relief under the Convention Against Torture.

This application includes the other named respon dents herein. A spouse or a child of an alien who is granted asylum may, if otherwise eligible for asylum, be granted the status as the principal alien. Since the adult female respondent has filed the asylum applica tion and the remaining respondents are dependent upon that application, this decision will primarily discuss the adult female with reference to other family members as appropriate.

To be eligible for asylum, an alien must demonstrate that he is a "refugee" within the meaning of Section 101(a)(42)(A) of the Act. A refugee is defined as any person who is unable or unwilling to return to his or her home country because of persecution or a well-founded fear or persecution on account of race, religion, nation ality membership in a particular social group, or politi cal opinion. An applicant for asylum has established a well-founded fear of persecution if it is shown that a reasonable person in his circumstances would fear persecution. *Matter of Mogharrabi*, 19 I & N Dec. 438 (BIA 1987). Furthermore, asylum, unlike withholding of removal, may be denied in the exercise of discretion to an alien who establishes statutory eligibility. *INS v Cardoza-Fonseca*, 480 U.S. 421 (1987).

To establish eligibility for withholding of removal, an alien must demonstrate a clear probability of perse cution in the country designated for removal on the same grounds as stated in the asylum statute. *INS v Stevic*, 467 U.S. 407 (1984). This means, that the alien must establish that it is more likely than not that he would be subject to persecution on one of the grounds specified in the Act.

In order to receive withholding of removal or defer ral of removal under the Convention Against Torture

the respondent must prove that it is more likely than not that he would be subject to torture if he is returned to the proposed country of removal. 8 C.F.R. 208.16(c)(2).

The record consists of the following documents: two asylum applications, an affidavit of the lead respondent, several documents concerning the medical condition of the respondent's son, Evgueni, and numerous documents concerning country conditions in Russia.

Before I proceed with an analysis of the facts of this case, I must comment on the credibility of the lead respondent. I have carefully observed the respondent's testimony and demeanor while on the witness stand. I find the respondent's testimony to be plausible, internally consistent, sufficiently detailed, and responsive to questions. I also find that the respondent, in certain portions of her testimony, may have exaggerated facts. The respondent had a tendency to state broad opinions concerning possible past persecution. When the respondent was questioned in further detail, it is clear that those broad opinions were not supported by fact.

This Court also is aware that the respondent's first asylum application did not contain all of the alleged incidents of past persecution. I find that the respondent explained adequately why she did not place all of the alleged past persecution incidents in her initial asylum application. On the whole, I find the respondent was a credible witness.

The respondents are claiming asylum based on past persecution and a well-founded fear of future persecution on account of their political opinion and also on account of the fact that the respondents claim to be

members of a particular social group singled-out fo persecution in Russia.

The lead respondent indicated that she believes sh suffered past persecution and will suffer future per secution due to her political opinion. The lead respon dent expressed her political opinion to other parents o handicapped children. She also attempted to writ newspaper articles concerning the government's treat ment of handicapped children. Her political opinion i that she is against the government's treatment o handicapped individuals.

The respondents are also claiming that they ar members of a particular social group singled-out fo persecution in Russia. They claim to be a family with child who has a debilitating disability known as cerebra palsy. They further claim that their child is a membe of a particular social group. They claim that the child i a disabled child in Russia. The respondents claim tha the family has been persecuted and will suffer futur persecution due to the fact that they are a family whos child is severely disabled.

FINDINGS OF FACT

I find that the respondent's child was born witl infantile cerebral paralysis, also known as cerebra palsy. I further find that the respondent's child wa separated from [his] parents for a period of five day while in the hospital. The child was then transferred t another hospital and deprived of his parents for period of two months. I further find that the lea respondent complained to the ministry of health o many occasions to be allowed to see her child.

The Court further finds that the conditions in th hospital in which the respondent's child was confine

were deplorable. The children were wrapped in old and dirty linen. They were wet and dirty, and no one cleaned them. They were not properly fed. One child had a severe spinal hernia and was crying in pain.

I further find that the respondent believed that the ministry of health was attempting to have her abandon her son. She was informed by members of the ministry of health that she should abandon her son so that he could be placed in a facility for handicapped children. I find that the respondent has a basis for believing that the government in Russia wishes to isolate handicapped children.

When the respondent was approximately one year old, he was diagnosed with the disease known as infantile cerebral paralysis. The respondent indicated that said diagnosis resulted in many disabilities to the respondent. The respondent testified that her child would not be admitted to public school because of his disease. The respondent also indicated that her child suffered harm when in public places because many citizens of Russia are not accustomed to seeing handicapped children.

Although the respondent testified that her child was refused medical treatment and support, the testimony clearly showed that her child did receive medical treatment. The respondent did not agree with the medical treatment given to her child. The respondent believed that her child was not being treated under the normal standards of treatment given to children with cerebral palsy.

The respondent also testified to two incidents of harm suffered by her child. The respondent testified that when her child was approximately six years old

she took him to a park. She stated that parents of other children in the park told their children to stay away from the respondent due to his disease. The respondent concluded accurately that the Russian society does not tolerate people with disabilities.

The respondent also testified as to another incident of past persecution where young men grabbed her child and was carrying him [to] a lake in a park. Respondent chased after these young men who then dropped the respondent's child. Respondent's child suffered a broken arm and injuries to his face. He was hospitalized for a period of two months.

The respondent also testified to another incident of past persecution where the respondent was in a park with her son. A woman noticed that her son had touched some clothing. This woman became enraged and pushed the respondent's child to the ground. The respondent's child suffered a severe laceration to his head which required medical treatment at a hospital.

The respondent claims that the above incidents of persecution were on account of the fact that the respondent and her family are members of the particular social group known as family members of children who are disabled.

The respondent also testified as to incidents of persecution based on her political opinion. The respondent testified that she joined an organization which cared for families. She also joined the Moon quasi-religious organization. The respondent believes that due to her participation in these organizations she suffered past persecution. She stated that after attending a meeting of the organization to protect families, people threw stones at her and threw stones at her automobile

The respondent also believes that due to her political opinion and due to the fact that she is a member of a particular social group singled-out for persecution, that her husband was laid off from his job and was unable to secure employment for a period of two years.

There was truly no connection between these incidents of harm and any of the grounds stated in the asylum statute. There was no evidence to show that there was a connection between the respondent's husband being laid off and the fact that the respondent has a political opinion and is a member of a particular social group. The other incident of harm concerned the throwing of rocks at the respondent. It can be assumed that individuals may have thrown stones at the respondent because she was attending a meeting of the organization to protect families, however, there was very little evidence to support this conclusion.

ANALYSIS

I find that the respondent and her family and child did suffer harm in Russia. It does appear that this harm was a result of the fact that the respondents are a member of the particular social group described above. The Court, however, concludes that the harm suffered by the respondent does not rise to the level of persecution. The fact that the respondent's son was unable to get the quality of medical treatment that he can secure in the United States is not persecution. The fact that the respondent's child was prevented from attending public schools is a more troubling issue. It is unclear as to why the respondent's child was unable to attend public school. It could be argued that the government of Russia is attempting to punish handicapped people by preventing them from attending public school. It could also be concluded from the facts in this

case that the Russian government does not hav sufficient resources to provide adequate schooling fo handicapped children. This Court takes notice of th documents concerning country conditions in Russia. I is clear that Russia is in dire economic straits. Th government of Russia does not have the resources t provide medical attention to individuals at the sam standards as in developed nations. The government o Russia also does not appear to have sufficient resource to educate handicapped children. This conclusion i based on a thorough reading of the entire Countr Reports prepared by the United States Department o State.

This Court finds that there are two sections of th Country Reports for Human Rights Practices for th year 2000 which should be included in this oral decisio I, therefore, incorporate by reference the sections o the Country Reports which are entitled "Children" an "People with Disabilities." The portion of the Countr Reports concerning children shows that children i Russia are certainly not treated as they are in mor developed nations. I will now quote a portion of thos Country Reports: "Although comprehensive statistic are not available, the prospects of children/orphans wh are disabled physically or mentally are extremely bleak The label of 'imbecile' or idiot, which signifies un educatable, is almost always irrevocable. The mos likely future is a lifetime in state institutions."

I wish to quote from another portion of the Countr Reports as follows: "The constitution does not addres directly the issue of discrimination against disable persons. Although laws exists that prohibit discrimi nation, the government has not enforced them. Th meager resources that the government can devote t

assisting disabled persons are provided to veterans of World War II and other conflicts. Special institutions exists for children with various disabilities, but do not serve their needs adequately."

As stated earlier, I find that the harm suffered by the respondent's family and her disabled child do not rise to the level of persecution. I, therefore, find that there is substantial discrimination against individuals with disabilities in Russia, however, that discrimination does not rise to the level of persecution. I find there has been no proof that either the respondent, her husband, or her child, suffered past persecution on account of any of the grounds stated in the asylum statute.

The respondent stated that she believed that if she returns to Russia with her family, her child will be killed and she and her husband may be imprisoned. This was a general statement which lacked any factual basis. It should be noted that the respondent and her child were able to live in Russia for a substantial period of time without being placed under arrest. It should also be noted that although the respondent was pressured to abandon her child, she was allowed to continue to live with her child and care for her child. It should further be noted that the respondent was allowed to leave Russia with her family on three separate occasions to come to the United States to secure adequate medical treatment for her child. The respondent and her family traveled to the United States on two different occasions in 1994. The purpose of those visits was to secure medical treatment for their child. The last entry to the United States by this family occurred on September 9th, 2000. The respondent informed the consular officers that she wished to have a visa to come

to the United States for the purpose of continuin treatment for her child.

Based on the above, I find that the respondent ha not borne her burden of proof that she has a well founded fear of persecution if she is returned to Russia I further find that the respondent's husband or chil have a well-founded fear of persecution if they're re turned to Russia. Based on these findings, I must den the application for asylum.

Since the application for withholding of removal an relief under the Convention Against Torture requires more stringent standard of proof, I find that the respor dents have not borne their burden of proving that the are entitled to withholding of removal or relief unde the Convention Against Torture.

Since there are no other relief applications pending, must therefore deny all applications for relief filed b the respondents and order that all three respondents b removed from the United States to Russia.

ORDERED

IT IS HEREBY ORDERED that the applications fo asylum, withholding of removal, and relief under th Convention Against Torture be denied.

IT IS FURTHER ORDERED that all three respor dents be removed from the United States to Russia o the charges contained in their individual Notices t Appear.

/s/ ANTHONY ATENAIDE
ANTHONY ATENAIDE
U.S. Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-71129
Agency Nos. A75-772-599, A75-772-600, A75-772-601

VICTORIA TCHOUKHROVA; DMITRI TCHOUKHROV;
EVGUENI TCHOUKHROV, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
RESPONDENTS

Filed: Dec. 5, 2005

ORDER

Before: STEPHEN REINHARDT, A. WALLACE TASHIMA, and KIM MCLANE WARDLAW, Circuit Judges. Dissent by Judge KOZINSKI.

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

KOZINSKI, Circuit Judge, with whom Judge O'SCANNLAIN, TALLMAN, RAWLINSON, BYBEE CALLAHAN and BEA join, dissenting from denial of rehearing en banc:

This case presents a question of exceptional importance with profound implications for our nation's immigration laws. The panel permits an applicant to claim asylum based on the harms suffered by her child. *See Tchoukhrova* v. *Gonzales*, 404 F.3d 1181, 1190 (9th Cir. 2005) ("[T]he harms suffered by a disabled child [may] be taken into account when determining whether to grant his parent's asylum application."). By allowing the harms suffered by a child to be imputed to the parent, the panel in effect creates a reverse derivative asylum claim—something expressly barred by 8 C.F.R. § 207.7(b)(6), which provides that "[t]he following relatives of refugees are *ineligible* for accompanying or following-to-join benefits . . . [a] *parent*, sister, brother, grandparent, grandchild, nephew, niece, uncle, aunt, cousin or in-law." *Id.* (emphasis added).

This exotic reading of the immigration statute was never discussed by the IJ, the BIA or even the parties—rather, it is something the panel comes up with on its own. Whatever the merits of such an approach, the panel concedes that neither the IJ nor the BIA "discuss[ed] the question expressly." *Tchoukhrova*, 404 F.3d at 1190. It strains credulity to suggest that the IJ and the BIA would have adopted such a sweeping change to the interpretation of the immigration statute without thinking long and hard about what they were doing. In *INS* v. *Ventura*, 537 U.S. 12, 15-17 (2002) (per curiam) (summary reversal), the Supreme Court told us in no uncertain terms that the agency charged with administering the statute gets first crack at ruling on

its construction. It has taken us less than three years to work our way around this rule.

The facts of the case are, indeed, sad and compelling. Evgueni Tchoukhrova was born in 1991 in Valdivostok, Russia, with cerebral palsy. He was treated badly in his first two months of life. Although his parents, Victoria and Dmitri, tried to provide for him, they encountered hostility from neighbors and indifference from the Russian government. Their government doctor recommended that Evgueni be institutionalized, or at the very least "isolated at home." Evgueni also suffered other injuries that the government failed to correct or investigate. *Tchoukhrova*, 404 F.3d at 1184-85.[1]

As a result of the government's indifference and hostility, Evgueni's parents joined with others and sought to raise public awareness of the plight of disabled

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[1] The government disputes key parts of the panel's factual summary, noting that the panel accepts as true certain allegations not presented at the hearing and that the IJ had no opportunity to adjudicate. For example, the government argues that the panel's finding that Evgueni was treated as "medical waste," *id.* at 1184, was not part of the IJ's findings and is an unexhausted claim on which the panel engages in original factfinding, *see* Respondent's Petition for Rehearing En Banc at 9 & n.3. The government also disputes the panel's finding that Evgueni was placed in an "internaty" during his first few months of life. *See Tchoukhrova*, 404 F.3d at 1193. ("[A]n internaty is an orphanage for abandoned orphans from 5 to 17 years old who have been diagnosed as uneducable because of severe mental impairment." Respondent's Petition for Rehearing En Banc at 10 n.4 (internal quotation marks omitted).) As the government points out in its Petition for Rehearing En Banc, the IJ found, and Victoria testified, that Evgueni was placed in a hospital, not an internaty. *Id.* (citing Certified Administrative Record at 56, 95). Because the facts included by the panel have no bearing on my dissent, I accept the panel's factual recitation.

children in Russia. The Tchoukhrovas endured mino harassment and their car was vandalized. Later Dmitri was fired from his job and told during subse quent job interviews that he should stop advocating fo rights for the disabled. *Tchoukhrova*, 404 F.3d at 118(Victoria filed an application for asylum and withholdin of removal, and listed both Evgueni and Dmitri a derivative applicants. *Id.* at 1187; *see also* 8 U.S.C § 1158(b)(3)(A) (spouse and children of principal appli cant may be granted asylum if accompanying, o following to join, principal applicant). The IJ foun Victoria's testimony credible and determined that he family belonged to a particular social group, "namely, ' family whose child is severely disabled.'" *Tchoukhrov* 404 F.3d at 1187. The IJ also found that the harm suffered by the family were on account of their mem bership in that group and that the government c Russia was responsible for the harms the group su fered because "Russia wishes to isolate handicappe children." *Id.* However, the IJ found that the harm suffered by the social group did not amount to pe secution. *See* Certified Administrative Record at 6 The BIA, in a summary ruling, adopted the IJ's decisio and denied relief, citing *Matter of Burbano*, 20 I. & N Dec. 872 (BIA 1994), "which holds that 'the Board final decision may be rendered in a summary fashion and that, in such cases 'the Board conclusions upo review of the record coincide with those which th immigration judge articulated in his or her decision.' *Tchoukhrova*, 404 F.3d at 118 (quoting *Burbano*, 20 I. N. Dec. at 874).

The panel overrules the BIA and rejects its finding no past persecution of the social group, holding that th finding was not supported by substantial evidence. *S*

id. But finding that a *group* was persecuted doesn't mean that every member of the group was persecuted. Rather, once an asylum petitioner has shown that he is a member of a persecuted group, he must still show that he himself has suffered or is likely to suffer persecution. *See, e.g., Hoxha* v. *Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (holding that '[asylee's] fear must be based on an individualized rather than generalized risk of persecution"); *Avetova-Elisseva* v. *INS*, 213 F.3d 1192, 1201 (9th Cir. 2000) (finding a well-founded fear of future persecution based on "a singling out of the petitioner so that an established current pattern of persecution of members of the group to which she belongs carries the personalized threat of *her* future persecution").

After finding that the Tchoukhrovas were members of a persecuted group, therefore, the panel was required to consider whether the asylum petitioner—here, Victoria—had herself suffered persecution. Instead of focusing on the harms suffered by Victoria, the panel holds that "the harms inflicted on the family members [must be treated] cumulatively," and thus "the harms suffered by a disabled child [may] be taken into account when determining whether to grant his parent's asylum application." *Tchoukhrova*, 404 F.3d at 1190. Although the panel admits that the agency never expressly discussed the issue, *id.*, the panel goes on to decide that "a parent of a disabled child may file as a principal applicant in order to prevent the child's forced return to the family's home country and may establish her asylum claim on the basis of the persecution inflicted on or feared by the child," *id.* at 1192.

Asylum claims are normally individual petitions, i.e., for the benefit of the petitioner. *See, e.g.*, 8 U.S.C.

§ 1158(a)(2)(D) ("An application for asylum of *an alie* may be considered . . . if *the alien* demonstrates . . the existence of changed circumstances which mater ally affect *the applicant's* eligibility for asylum. . . .' (emphasis added). The asylum statute does permit th filing of a derivate claim, that is, a claim based o another person's eligibility, in narrowly delimited ci cumstances: Derivative asylum claims may be filed o behalf of an eligible petitioner's spouse and childre *See id.* § 1158(b)(3). However, the regulations gover ing the admission of refugees expressly provide tha "[t]he following relatives of refugees are *ineligible* fc accompanying or following-to-join benefits . . . [a *parent*, sister, brother, grandparent, grandchild, ne hew, niece, uncle, aunt, cousin or in-law." 8 C.F.I § 207.7(b)(6) (emphasis added). The regulatory schem unmistakably provides than an asylum seeker ma include his spouse and children as derivative applicant but may not include his parents or other relatives.

Here, the harms suffered directly by Victoria a clearly not enough to amount to persecution; it is on the harms suffered by Evgueni that could possibly su port an asylum claim. But Evgueni is not the princip applicant; even if he were, he could not confer deriv tive status on his parents. The panel recognizes thi noting that "if the child is the principal applicant and granted asylum, the child can legally stay in th country, but his parents will be removed." *Tchouk rova*, 404 F.3d at 1191. The panel avoids this har result by inventing a doctrine of persecution renvoi: holds that Victoria may file as the principal applica and use the harms suffered by Evgueni to support *h* persecution claim, and thus enable Evgueni to file as derivative applicant. *See id.* at 1192. The panel th

permits persecution suffered by a child to be considered in support of his mother's persecution claim, which then permits the child (i.e., the only one who has actually suffered persecution) to be treated as a derivative applicant for asylum on the mother's application (even if the mother has personally suffered no persecution).

This reading of the immigration statute is, to put it mildly, strained. Congress adopted section 1158(b)(3) to provide for asylum for a clearly limited class of family members of those who were persecuted. The statute is quite specific that only the spouse and children of a principal applicant are entitled to derivative status. *See* 8 U.S.C. § 1158(b)(3). Parents are expressly not. *See* 8 C.F.R. § 207.7(b)(6). By assessing harms cumulatively, the panel moots this carefully drawn statutory scheme, and obviates the need for derivative status in the first place. Under the panel's reasoning, section 1158(b)(3) becomes mere surplusage, since the spouse and children of the principal applicant will *themselves* file as principal applicants once familial harms are assessed "cumulatively." This is all very new law.[2]

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[2] We have held that it may be appropriate to consider the harm suffered by family members in evaluating whether the principal applicant suffered persecution. For example, persecution suffered by one's relatives may corroborate an applicant's claim that he himself was persecuted. *See, e.g., Mashiri* v. *Ashcroft*, 383 F.3d 1112, 1120-21 (9th Cir. 2004); *Baballah* v. *Ashcroft*, 367 F.3d 1067, 1074-75 (9th Cir. 2004); *Salazar-Paucar* v. *INS*, 281 F.3d 1069, 1071, 1075 (9th Cir.), *amended by*, 290 F.3d 964 (9th Cir. 2002). Or, the government might target the children of its enemies as a means of persecuting their parents. *Cf. Thomas* v. *Gonzales*, 409 F.3d 1177, 1184, 1189 (9th Cir. 2005) (en banc) (holding that the targeting of family members "on account of their shared, immutable characteristic, namely, their familiar relationship," may

Even if this interpretation might ultimately preva
the BIA is entitled under *Chevron* to consider it in t
first instance. *See Chevron U.S.A. Inc.* v. *Natural Re
Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). T
panel claims that the agency, in fact, has already do

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constitute persecution). But that is quite different from what
have here.

The harm suffered by Evgueni is *not* evidence that Victo
suffered similar harm. That Evgueni may have received ina
quate medical care for his cerebral palsy says nothing about
quality of medical care that Victoria—an able-bodied adult—
received or will receive in Russia. Nor does the fact that strang
may have taunted Evgueni for being disabled help prove t
Victoria will be similarly taunted. Nor is there any allegation t
the government targeted Evgueni in a byzantine plot to pun
Victoria. Rather, the panel holds that the mere fact that Evgu
suffered harm is—without more—sufficient to impute that harm
Victoria for purposes of considering her asylum application. T
is a quantum leap that our cases do not support and the stat
prohibits.

Cases involving forced sterilization are likewise inappos
because "forced sterilization is a unique kind of persecution" t
inflicts a similar harm—depriving the family of any chance to p
create—on the husband. *Qu* v. *Gonzales*, 399 F.3d 1195, 1202
(9th Cir. 2005); *see also In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (B
2003) ("Coerced sterilization is better viewed as a permanent
continuing act of persecution that has deprived a *couple* of
natural fruits of conjugal life, and the society and comfort of
child or children that might eventually have been born to the
(emphasis added)). Whereas sterilizing a wife in effect sterili
her husband, providing Evgueni with inadequate medical care
not in any way affect his mother's health. *Qu* and *Y-T-L-* did
involve derivative claims or the imputing of harm from
member of a family to another. Rather, the claims for withhold
of removal in *Qu* and *Y-T-L-* were based on the fact that e
petitioner had, in effect, been sterilized by the authorit
mistreatment of his wife. Unlike here, the harm to the petition
in *Qu* and *Y-T-L-* was direct, not derivative.

this, but it is clear from the record that the agency did nothing of the sort. The panel maintains that the agency effected this sea-change in our immigration laws "[w]ithout discussing the question expressly," *Tchoukhrova*, 404 F.3d at 1190, pointing to a stray phrase in the IJ's oral decision, which it rips out of context and then claims was adopted chapter and verse by the BIA. Both steps in its analysis are fatally flawed.

As to the IJ, it is clear that he treated the harms to the family cumulatively only for purposes of determining whether the social group in question—here, the family of a disabled child—was persecuted. In making that determination, it was of course necessary to consider the harms suffered by the group cumulatively–just as one would consider the harms suffered by all Sikhs in a part of India in determining whether Sikhs as a group are subject to persecution.

Cumulating all the harms suffered by the Tchoukhrovas, the IJ found that the group had suffered no persecution. *See* Certified Administrative Record at 61. Having made that determination, the IJ had no reason to go on to the next step and figure out whether individuals in the group had been persecuted. His next statement that "there has been no proof that either the respondent, her husband, or her child, suffered past persecution on account of any of the grounds stated in the asylum statute," *id.*, thus could not, as a matter of either law or logic, have been a finding as to individual harms; rather, it was a restatement of his determination that the social group had not suffered persecution because none of its members had been persecuted. Restatements or summaries are common in oral rulings, and it does the IJ an injustice to take his words wholly

out of context and attribute to them a meaning he coul not possibly have intended.

Nor, of course, did the BIA "adopt" the IJ's suppose determination that, in assessing individual harm persecution of one family member may be attributed t all others, and vice versa. Petitioner advanced no suc theory before the BIA, and thus the BIA, in a case i which the IJ had found *no* group persecution, had r occasion to consider what the IJ might have said abo how individual harms are to be assessed. In affirmir the IJ under *Burbano*, the BIA did nothing more tha agree with the IJ that no group persecution had bee established. But a *Burbano* affirmance signals on that the BIA had adopted the IJ's decision with respe to those issues adequately raised on appeal; it does n equate to an acceptance of the IJ's entire decision wh only parts of that decision are appealed. *See Mabug* v. *INS*, 937 F.2d 426, 430 (9th Cir. 1991) (dismissi arguments petitioner failed to raise before the BIA The BIA could not have imagined that by summari affirming the IJ's denial of relief, it was actually cutti a large hole in the fabric of our immigration laws.

As the government warns in its Petition for Rehea ing En Banc, the panel's opinion has far-reaching imp cations, and the issues raised therein are likely to r occur with increasing frequency. *See, e.g., Abay Ashcroft*, 368 F.3d 634, 641-42 (6th Cir. 2004) (granti asylum to mother based on her fear that her daught will be subjected to female circumcision); *Oforji Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) (holding female circumcision case that "an alien parent who h no legal standing to remain in the United States m not establish a derivative claim for asylum by pointi to potential hardship to the alien's United States citiz

child in the event of the alien's deportation"). Despite the panel's best efforts to muddy the waters, the fact is, the IJ and the BIA did nothing like what the panel attributes to them; they'd surely be shocked at the suggestion that they did. *Ventura* requires a remand so the agency can, in the first instance, rule on the inventive arguments adopted by the panel, arguments that were neither raised below nor by any of the other parties on appeal.

Because this decision is nothing but a big end-run around *Ventura*, we should have taken the case en banc and repaired the damages ourselves.

APPENDIX E

1. 8 U.S.C. 1101(a)(42) provides in pertinent part:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any pers who is outside any country of such person nationality or, in the case of a person having nationality, is outside any country in which su person last habitually resided, and who is unable unwilling to return to, and is unable or unwilling avail himself or herself of the protection of, th country because of persecution or a well-found fear of persecution on account of race, religio nationality, membership in a particular social grou or political opinion, or (B) in such special circu stances as the President after appropriate consult tion (as defined in section 1157(e) of this title) m specify, any person who is within the country such person's nationality or, in the case of a pers having no nationality, within the country in whi such person is habitually residing, and who persecuted or who has a well-founded fear of pers cution on account of race, religion, nationality, me bership in a particular social group, or politi opinion. The term "refugee" does not include a person who ordered, incited, assisted, or otherwi participated in the persecution of any person account of race, religion, nationality, membership a particular social group, or political opinion. F purposes of determinations under this chapter person who has been forced to abort a pregnancy to undergo involuntary sterilization, or who h

been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * * * *

2. 8 U.S.C. 1158 (2000 & Supp. II 2002) provides:

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

* * * * *

(b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to a alien who has applied for asylum in accordanc with the requirements and procedures estal lished by the Attorney General under this sectic if the Attorney General determines that suc alien is a refugee within the meaning of sectic 1101(a)(42)(A) of this title.

* * * * *

(C) Additional limitations

The Attorney General may by regulatic establish additional limitations and condition consistent with this section, under which a alien shall be ineligible for asylum unde paragraph (1).

* * * * *

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in sectic 1101(b)(1)(A), (B), (C), (D), or (E) of this title) o an alien who is granted asylum under th subsection may, if not otherwise eligible fc asylum under this section, be granted the sam status as the alien if accompanying, or followir to join, such alien.

* * * * *

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

* * * * *

3. 8 U.S.C. 1231(b)(3) provides in pertinent part:

§ 1231. Detention and removal of aliens ordered removed

* * * * *

(b) Countries to which aliens may be removed

* * * * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *